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NO. 85-102

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MEN'S WEARHOUSE, INC., APPELLANT

V.

MICHAEL HELMS, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION TO AFFIRM OR IN THE ALTERNATIVE MOTION TO DISMISS

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OBJECTIVE OF MOTION

Appellee, Michael Helms, seeks affirmance of the judgment of the Supreme Court of Texas because the issues raised on appeal in the state court were regarding the interpretation of the Texas Rules of Civil Procedure and were thoroughly exhausted by the state appellate courts. The issues presented are not substantial for review by the United States Supreme Court, and therefore do not need further argument. In the alternative, Appellee moves this Honorable Court to dismiss the

appeal by Men's Wearhouse, Appellant, because the jurisdictional prerequisite has not been met requiring the state statute to be repugnant to the Constitution of the United States. Appellant invokes jurisdiction pursuant to 28 U.S.C. § 1257(2). Appellant purports to be within the strictures of § 1257(2) by alleging that a Constitutional question is raised by the interpretation of a Texas Rule of Civil Procedure. Appellant has failed to meet this burden in showing that the Texas Rule of Civil Procedure in question raises a Constitutional issue, and therefore, the United States Supreme Court is without jurisdiction.

FACTS ON WHICH MOTION IS BASED

This is a suit for damages arising out of an assault and battery and false imprisonment of Appellee, Michael Helms, by the Men's Wearhouse, Appellant. Suit was maintained in the District Court of Harris County, Texas. Trial was to the court, without a jury, and after consideration of the evidence, the

trial judge entered judgment for Appellee, Michael Helms. The trial court filed findings of fact and conclusions of law in support of its judgment.

Appellant, Men's Wearhouse, prosecuted an appeal from the judgment of the trial court, but did not properly and timely file the statement of facts for review by the Court of Appeals of Texas. Additionally, Appellant, Men's Wearhouse, did not request an extension of time as provided by Texas Rule of Civil Procedure 21c. Appellant, Men's Wearhouse, filed a Motion to File Statement of Facts Late in the Court of Appeals of Texas which was denied. This Motion was not provided for in the Texas Rules of Civil Procedure, because Appellant failed to timely avail itself of late filing pursuant to Rule 21c. The Court of Civil Appeals of Texas, therefore, properly denied the Motion. On December 11, 1984, the First Court of Appeals of Houston, Texas affirmed the trial court's judgment. Appellant then sought an Applica-

tion for Writ of Error in the Supreme Court of Texas which raised the issue of the Court of Appeals disallowing the late filing of the statement of facts. The Supreme Court of Texas refused the Application for Writ of Error on March 6, 1985 and found that there was no reversible error committed by the Court of Appeals of Texas. Appellant's Motion for Rehearing was denied on April 10, 1985.

Appellee, Michael Helms, takes exception to the facts presented by Appellant, Men's Wearhouse. In Appellant's statement of the facts, several times Appellant referred to the court reporter failing to file the statement of facts as requested by Appellant. These references are misleading because the responsibility of the filing of the statement of facts falls on the attorney and not the court reporter. The court reporter may be requested by the attorney to prepare the statement of facts but the ultimate filing of the statement of facts is the responsibility of

the attorney and cannot be delegated. Texas Rule of Civil Procedure 386 (Appendix A). The Rules of Civil Procedure are directed to the attorney, and Rule 386 does not provide that it is the court reporter's responsibility to file the statement of facts.

ARGUMENT

Texas Rule of Civil Procedure 386 permits a late filing of the statement of facts only pursuant to a timely Rule 21c motion. The last sentence in Rule 386 expressly states:

> The court shall have no authority to consider a late filed transcript or statement of facts, except as permitted by Rule 21c.

Texas Rule 386 provides a timetable for the filing of transcripts and statement of facts. As expressly stated by the rule, the only way to file a statement of facts late, is by filing a timely Rule 21c motion which reasonably explains the reason for the late filing of the statement of facts. Such motion, as provided by Rule 21c, must be filed within fifteen days of the last date

for filing of the statement of facts. Appellant, Men's Wearhouse, did not timely file the statement of facts, nor did Appellant timely file a Motion for Extension pursuant to Rule 21c. As a result, the Court of Appeals and the Supreme Court of Texas both denied Men's Wearhouse to file any such statement of facts beyond the time provided for filing in the Texas Rules of Civil Procedure.

The relevant Texas law construing the filing of the statement of facts is controlled by B. D. Click Co. v. Safari Drilling Corp., 630 S.W.2d 860 (Tex. 1982). The Click decision was the Texas Supreme Court's definitive answer to the problems arising from late filing of the transcript or statement of facts. The language in the Click decision is unequivocal and the Texas court held that:

> An Appellant's motion for extension of time to file the transcript and statement of facts must be filed within fifteen days of the last date for filing as prescribed by Rule 21c. Click at 862.

This decision was intended to put an end to any confusion concerning when the court's authority to consider a statement of facts and transcript ceased. The intention of the Supreme Court is plain and clear from the Click decision, but they went a step further and put the verbage of the decision into the Texas Rule itself. Texas Rule 386 in essence mirrors the Click decision, and in fact was changed by amendment effective April 1, 1984 which embodies the following language in a footnote to the rule:

> The last sentence has been added and the provision that late filing shall not affect the court's authority has been deleted to conform to B. D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 860 (Tex. 1982).

The footnote to Rule 386 shows a clear intention to eradicate any confusion about the late filing of statement of facts.

Appellant, Men's Wearhouse, has alleged jurisdiction under 28 U.S.C. § 1257(2), by seeking to illustrate disparate treatment by the application of Texas Rule of Civil Procedure 21c which would be violative of due process and equal protection provisions of the United States Consti-

tution. Appellant seeks to do this by showing that there are two classes of individuals for the purpose of late filing of statement of facts by relying on the Texas Supreme Court case of Cheek v. Zalta, 669 S.W.2d 719 (Tex. 1984).

This case is clearly distinguishable from the case at bar. The court reporter in the Cheek case failed to prepare the statement of facts because the court reporter had not physically transcribed nor prepared the statement of facts. The Cheek case involves the Texas Court of Appeals dismissal of Ralph Cheek's appeal of a trial court judgment for failure to file a statement of facts. In this case, Cheek timely filed a Rule 21c Motion for Extension to File the Statement of Facts on September 20, 1983. The extension was to run until October 15, 1983. However, October 15 passed and the Court of Appeals had not yet ruled on Cheek's motion. On November 10, 1983, the Court of Appeals granted the motion but only until October 15,

1983. When the court granted the motion which extended the time to October 15, that date had already passed.

The granting of the motion operated nunc pro tunc to October 15, which prevented Cheek from filing a second Motion for Extension within the fifteen day time period prescribed by Rule 21c. It is important to note, that on November 10, 1983, the date the Court of Appeals granted the motion, the court reporter still had not completed the preparation of the statement of facts. This has nothing to do with the filing of facts, but rather with the physical preparation of the statement of facts. The failure of the court reporter to prepare the statement of facts was through no fault of the Appellant Cheek. Cheek had timely filed a motion for extension pursuant to the rules and had in fact complied with the Texas Rules of Civil Procedure completely.

The Texas Supreme Court decided that it was abuse of discretion to dismiss an appeal

for failure to file the statement of facts, if the failure was not the fault of the Appellant. In this case, the failure for Cheek to timely file the statement of facts had nothing to do with Cheek's actions, but rather because the court reporter had not actually prepared the statement of facts. Since no statement of facts was prepared, there was no way possible for Cheek to file something that did not exist. Bear in mind, that it is the court reporter's responsibility to prepare the statement of facts, but it is not the court reporter's responsibility to plied with the Texas Rules of Civil Procedure completely.

The Texas Supreme Court in Cheek decided that it was abuse of discretion to dismiss an appeal for failure to file the statement of facts, if the failure was not the fault of the Appellant. In this case, the failure for Cheek to timely file the statement of facts had nothing to do with Cheek's actions, but rather because the court reporter had not

prepared the statement of facts. Since no statement of facts was prepared, there was no way possible for Cheek to file something that did not exist. Bear in mind that it is the court reporter's responsibility to prepare the statement of facts, but it is not the court reporter's responsibility to actually file such statement of facts. The Texas Supreme Court ruled that Cheek should have a second opportunity to file a Rule 21c extension to enable Cheek to timely file the statement of facts.

Cheek v. Zalta is distinguishable from the case at bar in at least two major aspects. First, in Cheek, the court reporter had failed to timely complete the statement of facts. This failure had nothing to do with Cheek and was not related to any fault of his.

Secondly, the case is distinguishable because in Cheek, there was a timely filing of a Rule 21c motion to extend time. In the present case, there was no such timely filing

of a Rule 21c motion. Therefore, the Texas Supreme Court correctly held in the present case that it did not have authority to consider a motion to extend which was filed after the time limits provided in Rule 21c.

These two distinguishing factors make the Cheek are inapplicable to the case at bar, and does not create a disparity in the application of the Texas Rules of Civil Procedure. Appellant has alleged that there is a distinction between groups of litigants who file late which was created by the exception in Cheek. The two purported classifications are the litigants which are controlled by the Cheek decision and those who are controlled by the Click decision. The present case would fall into the latter category. The difference in the alleged classifications is in the allowance of late filing of the statement of facts. This is a total misinterpretation of these decisions. The Cheek case and the Click case, controlling the case at bar, apply to two clearly distinguishable

situations and are not related. There is not a creation of a classification of individuals which has been unfairly treated pursuant to the United States Constitution and it's protections of due process and equal protection.

In order to apply the traditional equal protection analysis employed in Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) and later stated in Reed v. Reed, 404 U.S. 71 (1971), there must be a classification in question in which there has been a dissimilar treatment. Reed at 76. In the case at bar, there is no classification created since there is no disparate treatment of litigants. Appellant has attempted to compare two situations which are not comparable, and are in fact totally dissimilar. Discussion and analysis of due process and equal protection need never be reached because the threshold requisite of a classification involving dissimilar treatment is not met. The interpretation of the Texas Rules of Civil Procedure 386 and 21c by the Texas Supreme Court

presents no Constitutional violation, and as such, Appellant, Men's Wearhouse, has failed to satisfy the jurisdictional requirement pursuant to 28 U.S.C. § 1257(2).

It is respectfully submitted that the interpretation of the Texas Rules of Civil Procedure 386 and 21c by the Texas Supreme Court was not violative of the Constitution of the United States. It is further urged that Appellant, Men's Wearhouse, has not stated jurisdiction pursuant to 28 U.S.C. § 1257(2), and for this reason Appellee, Michael Helms, urges that this Honorable Court grant his Motion to Affirm Or In The Alternative Motion to Dismiss.

Respectfully submitted,

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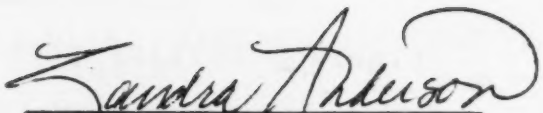

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct coy of the foregoing Motion to Affirm or in the Alternative Motion to Dismiss was mailed Certified Mail, Return Receipt Requested on the 1st day of Aug., 1985, to Mr. John F. Nichols, 1440 Lyric Centre Building, 440 Louisiana, Box 140, Houston, Texas 77002.

Howard L. Nations
HOWARD L. NATIONS

APPENDIX A

Rule 386. Time to File Transcript and Statement of Facts

The transcript and statement of fats, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, within one hundred days after the judgment is signed, subject to the provisions of Rule 428. If a writ of error has been perfected, the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. [The court shall have no authority to consider a late filed transcript or statement of facts, except as permitted by Rule 21c.] [Bracketed portion added April 1, 1984, and not applicable to this case.]

Rule 21c. Extensions of Time on Appeal

(1) An extension of time may be granted for late filing in a court of civil appeals of a transcript, a statement of facts, motion for rehearing, or application to the supreme court for writ of error, if a motion reasonably explaining the need therefor is filed within fifteen (15) days of the last date for filing as prescribed by the applicable rule or rules.

(2) A motion for late filing of an application for writ of error shall be filed in, directed to and acted upon by the supreme court. A copy of the motion shall be filed at the same time in the court of civil appeals, and the clerk of the supreme court shall notify the court of civil appeals of the action taken on the motion by the supreme court.

Motions for late filing of the other instruments designated herein shall be filed in, directed to and acted upon by the court of civil appeals in which the cause is pending. Any order of the court of civil appeals granting or denying a motion for late filing of any such instruments shall be reviewable by the supreme court for arbitrary action or abuse of discretion.